In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1505

MID-SOUTH TOWING COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A4) is reported at 436 F. 2d 393. The Board's decision and order (Pet. App. A5-A28) are reported at 177 NLRB No. 123.

JURISDICTION

The judgment of the court of appeals was entered on January 13, 1971. The petition for a writ of certiorari was filed on March 23, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the findings

of the National Labor Relations Board that the Company committed unfair labor practices by suspending and discharging an employee because of his union activities and engaging in other acts of coercion during a union representation campaign.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act (61 Stat. 136, as amended, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are set forth at pages A29-A30 of the appendix to the petition.

STATEMENT

The Company, a river barge line, operates the motor vessels *Martha Lynn, Girlie Knight* and *Julia Woods* to transport freight on the Mississippi and Ohio rivers. In June or July 1967, the Marine Officers Association, Local 54, International Brotherhood of Teamsters, began an organizing campaign among the Company's employees (Pet. App. A7-A8).

1. *The Company's acts of restraint and coercion*

From the inception of the campaign, deckhand Alvin Mansfield solicited signed union pledge cards from his fellow crew members aboard the *Martha Lynn* (Pet. App. A8; R. 57).[1] In December 1967, the captain of the *Martha Lynn* told Mansfield that the Company had advised him to discharge "undesirable personnel," specifically including Mansfield, because he "was trying

[1] "R." references are to the joint appendix filed in the court below.

to organize the [Union] * * * on the Martha Lynn" (Pet. App. A8-A9; R. 62-64). Later on that month, deckhand Peter Oreskovich, who had also been soliciting employees for the Union, was told by Assistant Port Engineer John Snyder that his organizing efforts were "endangering" his job and were putting him in "bad standing with the Company" (Pet. App. A9; R. 105-106).

The following month, Port Captain Andy Ross came aboard the *Martha Lynn* and told Oreskovich that one of the employees had signed a statement accusing Oreskovich of threatening him with the loss of his job if he refused to sign a union card (Pet. App. A11; R. 107-108). Upon Oreskovich's denial of having made any such threat, Ross offered to give him the name of the complaining employee if Oreskovich would reveal the names of the crew members who had signed pledge cards and would also reveal what he knew about Mansfield and another employee. When Oreskovich refused, Ross told him that Company President Noble Gordon had stated that, "no union [was] going to organize this company ever, and they had just been feeding us a pack of lies and they couldn't benefit us at all" (*ibid*). Also during January, Snyder warned Mansfield to stop soliciting pledge cards because he "was skating on pretty thin ice with the company" (Pet. App. A10; R. 64-65).

In late January, after the Union had filed a representation petition with the Board and an election had been directed for March 15 (Pet. App. A8; R. 172-177), President Gordon gave a speech to the crew of the

Martha Lynn in which he stated that the Union consisted of "thugs, convicts, liars and scum of the earth," that it "had a long record of thievery and all kinds of scullduggery", that "[he] would not at any time let the [Union] * * * take an unfair advantage by coercive tactics by threats and intimidation, which is their stock in trade", and that "there wasn't any union going to organize this company" (Pet. App. A12-A15; R. 67, 108, 120-121, 123). Gordon also enumerated the benefits provided by the Company, stated that the Union was "only interested in power and money" and not in the employees' welfare, and warned that "the only weapon they had was to strike this company, and should that come about we would fulfill our obligations and responsibilities to customers and that meant running the boats" (Pet. App. A13-A14; R. 124-125). He discussed the Florida right-to-work law at length and stated that the Company would never agree to a union shop (Pet. App. A14; R. 125). Finally, Gordon claimed that the Company had been engaged in discussions with the Rivermen's Association and the employees "would have already had a raise if it hadn't been for certain people holding up negotiating the contract through the Rivermen's Association" (Pet. App. A13; R. 108-109). Gordon then turned to Mansfield and asked, "How about you, Mansfield, has anyone been telling you any lies?" (Pet. App. A13; R. 68, 109).

On February 1, 1968, the Company gave the employees a wage increase of one dollar per day (Pet. App. A15-A16; R. 68, 109). Subsequently, a statement

reading, "I withdraw my support from the [Union]" was circulated among the *Martha Lynn* crew (Pet. App. A16; R. 80-81, 110). Mansfield was told that he would not be fired if he signed. He refused to sign (Pet. App. A16; R. 80-81). Oreskovich, however, signed a copy of the statement, given to him by Snyder (Pet. App. A16; R. 110).

2. *The discharge of Mansfield*

On February 5, Mansfield was taken ashore, on his request, for treatment of possible appendicitis. The examining physician was unable to confirm the presence or absence of the ailment, but told Port Captain Ross that Mansfield could not go back to work and should be put in a hospital for a couple of days (Pet. App. A17-A18; R. 67-73, 145-146, 155). The physician then agreed to allow Mansfield to go home and see his personal doctor (Pet. App. A19; R. 73).

The next morning, Dr. Stephen Burkhart examined Mansfield, told him he had a prostate infection and was tender around his appendix, gave him medication, and asked him to return sometime the following day (Pet. App. A19; R. 75). Later that day, Captain Ross called Dr. Burkhart and was told of the diagnosis and treatment (Pet. App. A19, n. 13; R. 156).

The following day, February 8, Mansfield, feeling a little better, attended the Board hearing on the Union's representation petition (Pet. App. A19; R. 75). Although he did not have time to see the doctor that day, he saw him the following morning and was given a refill prescription and told to return on February 12,

which Mansfield did (Pet. App. A20; R. 180, 76). Thereafter, as Dr. Burkhart predicted, the infection subsided (Pet. App. A20; R. 76).

On February 8, Captain Ross, who had observed Mansfield at the Board hearing, called Dr. Burkhart and was told that Mansfield's appendix had cleared up, but that he still had "a slight problem with his prostate" and was taking medication (Pet. App. A20, n. 15; R. 156-157). Mansfield subsequently received a letter from Ross, dated February 14, advising him that he was being given a 30-day disciplinary suspension for misrepresenting his illness in order to attend the Board hearing (Pet. App. A20-A21; R. 181).

Although about a week later Ross told Mansfield that he could return to work when his suspension ended (Pet. App. A21; R. 78), Mansfield was permanently discharged about the date the suspension was scheduled to terminate. The letter of discharge reiterated the accusations leading to Mansfield's suspension and further alleged that Mansfield had "threatened to use physical violence against one of the mates when [he was] ordered to carry out some of [his] normal duties as a deckhand"[2] (Pet. App. A21-A22; A36-A37; R. 79, 182-183).

3. *The decisions below*

Upon the foregoing facts the Board, in agreement with the trial examiner, concluded that the Company

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[2] The incident mentioned in the letter had occurred from six months to a year before Mansfield's discharge (Pet. App. A22-A23; R. 81-83, 96).

had committed unfair labor practices in violation of Section 8(a)(1) of the Act by threatening employees Peter Oreskovich and Alvin Mansfield with discharge if they refused to cease their union organizing activities (Pet. App. A9-A10); by soliciting Oreskovich and Mansfield to withdraw their union membership (Pet. App. A16-A17); by interrogating Oreskovich about the union affiliations of other employees and warning him not to attend a Board hearing involving the Union (Pet. App. A12); by singling out and questioning Mansfield concerning union activities (Pet. App. A15); by telling its employees that they would have had a wage increase but for the Union (Pet. App. A14); by granting a wage increase shortly thereafter when the Union filed a representation petition (Pet. App. A16); and by indicating that support of the Union would be futile because the Company would never agree to recognize it (Pet. App. A15). The Board also agreed with the trial examiner that the Company had suspended and subsequently discharged Alvin Mansfield for engaging in union activity and had thereby violated Section 8(a)(3) and (1) of the Act (Pet. App. A25). The Board ordered the Company, *inter alia,* to reinstate Mansfield with backpay (Pet. App. A27).

The court of appeals, in a *per curiam* opinion, upheld the Board's decision and enforced its order (Pet. App. A1-A4).

ARGUMENT

The Company's basic contention that the Board's order requiring the reinstatement of Mansfield would

render its vessel unseaworthy rests on the premise that Mansfield was discharged for threatening another seaman. The court of appeals correctly concluded, however, that substantial evidence supported the Board's finding that Mansfield was discharged for union activity and not for physically threatening a fellow employee some six months to a year prior to the discharge. In any event, only an evidentiary issue is presented and further review is not warranted. See *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 491.

The Company's additional contention that it was justified in engaging in the challenged conduct to counteract its supervisory personnel's pro-union activity is without merit. An employer can adequately protect himself against such activity without committing unfair labor practices. See *National Labor Relations Board* v. *Douglas County Electric Membership Corp.,* 358 F. 2d 125, 130-131 (C.A. 5).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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